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15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA  
17 OAKLAND DIVISION

18 SUCCESSFACTORS, INC., a Delaware  
19 corporation,

20 Plaintiff,

21 v.

22 SOFTSCAPE, INC., a Delaware  
23 corporation; and DOES 1-10,

24 Defendants.

Case No. C-08-1376 CW (BZ)

**PLAINTIFF SUCCESSFACTORS, INC.'S  
RESPONSE TO DEFENDANT'S EVIDENTIARY  
OBJECTION AND REQUEST TO STRIKE  
DECLARATION OF KEVIN MOORE IN SUPPORT  
OF PLAINTIFF'S MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS, FURTHER  
INTERROGATORY ANSWERS AND PROPER  
PRIVILEGE LOGS**

Date: September 10, 2008  
Time: 10:00 a.m.  
Special Master: Jack Russo

Date of Filing: July 30, 2008  
Trial Date: June 1, 2009

## INTRODUCTION

SuccessFactors, Inc. was forced to file a motion to compel due to Softscape, Inc.'s continued resistance to producing discovery, in particular electronically stored information. Softscape continues its obstructionist methods with meritless objections to the reply declaration of Kevin Moore filed in support of SuccessFactors' July 30, 2008 motion to compel. Softscape's objections largely appear to re-argue the merits of SuccessFactors' motion to compel rather than attack on legitimate evidentiary grounds the admissibility of Mr. Moore's declaration. Softscape's objections regarding the timeliness and relevance of the Moore declaration are without merit and appeared aimed principally at distracting from the core issue that Softscape continues to withhold highly relevant information. Softscape's objection and request to strike should be overruled.

## ARGUMENT

### **I. SUCCESSFACTORS DID NOT OFFER IMPROPER "NEW" EVIDENCE**

Softscape attempts to tie the disputes regarding overwritten revisions of the Presentation to the August 20, 2008 declaration of Kevin Moore in support of SuccessFactors' reply brief. (*See* Dkt. No. 201.) This is a non-sequitur since the Moore declaration does not discuss the missing revision issue.<sup>1</sup> The Moore declaration responds to the declaration of Mr. Fougere submitted in support of Softscape's opposition as well as Softscape's arguments regarding the types of metadata information that may exist and refutes the assertion that extracting some of the requested metadata information would be burdensome. (*Compare* Dkt. No. 201, ¶¶ 6-11, *with* Dkt. No. 190, ¶¶ 10-13 & Dkt. No. 187, at 3:23-25 & 4:20-21.)

SuccessFactors submitted the Moore Declaration to address Softscape's arguments raised for the first time in the opposition papers. Softscape opposed SuccessFactors' motion through attorney argument asserting undue burden (Dkt. No. 187, at 3:23-25 & 4:20-21; *accord* Dkt. No. 211, at 1:15-17) and disputing the nature and utility, though not the existence, of additional metadata information within Softscape's system and hard drives to avoid an order compelling

<sup>1</sup> However, should additional Presentation versions exist and are produced by Softscape, SuccessFactors maintains that such documents should be produced with the metadata currently sought by SuccessFactors' motion.

1 production. (Dkt. No. 190, Fougere Decl. ¶¶ 10-13.) Mr. Moore's declaration responds to the  
 2 unsupported attorney argument regarding burden by pointing out the requested information  
 3 should already be readily accessible assuming Softscape's document collection was performed  
 4 properly. (Dkt. No. 201, ¶¶ 7-11.) Mr. Moore's declaration also responds to Mr. Fougere's  
 5 statements asserting confusion as to what information was meant by the term "local drive  
 6 directory structures" and alluding to local drive file histories comprising material already  
 7 produced by Softscape in the form of embedded file metadata. (*Compare* Dkt. No. 190, Fougere  
 8 Decl. ¶¶ 12-13, *with* Dkt. No. 201, ¶¶ 10-11.) There was nothing improper about submitting Mr.  
 9 Moore's declaration in response to Softscape's opposition papers. Its objections to the contrary  
 10 should be overruled.

11 The evidence included in Mr. Moore's declaration is highly relevant to the underlying  
 12 discovery dispute. It is well-settled that on a motion to compel, where information appears  
 13 relevant (as it surely does with respect to Presentation metadata and revision information), "the  
 14 party resisting the discovery has the burden to establish the lack of relevance . . . ." *Beach v. City*  
 15 *of Olathe*, 203 F.R.D. 489, 495-96 (D. Kan. 2001); *see also Culkin v. Pitney Bowes, Inc.*, 225  
 16 F.R.D. 69, 71 (D. Conn. 2005) (objecting party "bears the burden of showing why discovery  
 17 should be denied") (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)).  
 18 Moreover, "in opposing discovery on grounds of burdensomeness, the *objecting party* is required  
 19 to demonstrate that the time and expense involved in responding to the requested discovery will,  
 20 in fact, be unduly burdensome." *Residential Constructors, LLC v. Ace Prop. & Cas. Ins. Co.*, No.  
 21 2:05-cv-01318, 2006 U.S. Dist. LEXIS 80403, at \*25-26 (D. Nev. Nov. 1, 2006) (emphasis  
 22 added); *Cory v. Aztec Steel Bldg., Inc.*, 225 F.R.D. 667, 672 (D. Kan. 2005).

23 The Moore declaration simply refutes Softscape's attempts in its opposition papers to  
 24 substantiate its spurious relevance and burden objections. SuccessFactors' submission is proper,  
 25 timely and could not be done in the opening papers. *See Contratto v. Ethicon, Inc.*, 227 F.R.D.  
 26 304, 309 n.5 (N.D. Cal. 2007). When Softscape made an attempt at asserting relevance and  
 27 burden objections by including *inter alia* a client declaration, SuccessFactors appropriately  
 28 responded with the declaration of Mr. Moore and appropriate arguments in its reply brief.

SuccessFactors was not obligated to disprove Softscape's objections in advance. There is no reason to strike the declaration as "new" evidence.<sup>2</sup>

### CONCLUSION

For the foregoing reasons, SuccessFactors respectfully requests that Softscape's Evidentiary Objection and Request to Strike Plaintiff's Declaration of Kevin Moore in Support of Plaintiff's Motion to Compel Production of Documents, Further Interrogatory Answers and Proper Privilege Logs be overruled in its entirety.

Dated: September 5, 2008

FENWICK & WEST LLP

By:           /s/ Henry Z. Carbajal III            
Henry Z. Carbajal III

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<sup>2</sup> Softscape's citation to *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) is inapposite. *Provenz* dealt with the special circumstance of new evidence in a reply to a motion for summary judgment, which cannot be considered unless the opposing party has an opportunity to respond. *Id.* Additionally, Softscape's citation to *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) is irrelevant as the case addressed waiver of issues first raised in a reply *appellate* brief.